Supreme Court, U.S.
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No. 09-697

IN THE
Supreme Court of the United States

TOM ROBINSON and ROBERT TYGARD,

Petitioners,

v.

CANDACE LEHMAN,
Administrator of the Estate of Joshua Lehman,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY A. DICKERSON
9655 Gateway Drive, Suite B
Reno, NV 89521
(775) 786-6664
jeff@gbis.com

Attorney for Respondent

229264

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider whether a violation of the Fourth Amendment exists where, construing the evidence most favorably to Respondent and as viewed on the videotape, it is clear Petitioners shot and killed Respondent's decedent where decedent was fully contained by vehicles and armed officers and posed no immediate danger to officers or others in the area.

2. Should this Court grant certiorari when this Court's Fourth Amendment law was at the time clearly established such that a reasonable officer in Petitioners' position would have known his conduct was unconstitutional.

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SUMMARY OF ARGUMENT

This case presents issues already considered and addressed by this Court. No new or additional guidance is needed. No important question is presented upon which further guidance is needed. The decision below does not present a case by which a supposed conflict among the Circuits can be addressed. This is not an exceptional case that warrants this Court's exercise of its supervisory power over lower courts. This case does not represent a Circuit hell-bent on "unwritten poli[cies]" that run counter to this Court's already-clear jurisprudence on qualified immunity in deadly force cases. To the contrary, the decisions below herald the correct and incisive application of this Court's settled qualified immunity analysis in deadly force cases. Certiorari should not issue.

STATEMENT OF FACTS

Deputy Stahl and Trooper Giurlani were engaged in negotiation with Lehman. As such, they were in charge of the scene. This is the first phase in negotiating a suspect's surrender. Lehman was contained and blocked with vehicles. Lehman was compliant with commands not to exit the vehicle. When he backed, the NHP vehicle stopped him. Even if went forward, there were sufficient resources to stop him. After he hit the NHP rig, he was stopped in reverse and sat there for two seconds. Petitioners then shot him.

Officer Bruton deployed his taser. The top dart hit Lehman in the neck and Bruton cycled the taser. Lehman reacted by flinching and jerking away. McGee

then deployed his taser successfully. Lehman tensed up and went rigid. Both Wright and McGee then cycled their tasers at the same time with noticeable affect, "It looked like it affected him pretty good." McGee thought was going to become compliant, then McGee felt rocks coming out from underneath the tires and hitting him. He moved south. He then heard the shots. McGee has been tasered, and testified it feels like muscles being torn off your bones. According to McGee, Lehman did not do anything in preparation for back-up of the vehicle, including shifting gear, looking around, looking behind, looking in mirrors.

Daniels was positioned with a view of the back of the truck when Rinaldo tried to break the passenger window. Daniels did not see any officers at the back of the truck.

Giurlani cannot pinpoint any officer behind the truck at the time of the shooting. From his point of control, he assessed that no citizens were endangered at the time of the shooting. If Lehman tried to go forward and north he would have run into a fence. Progress was being made on negotiations, and there was dialogue. Tygard suddenly stepped in front of Giurlani to shoot Lehman.

Klier was the primary officer once the pursuit began. Klier testified that he saw no need for the use of deadly force at any time in the situation. Klier had a .45 caliber Smith & Wesson in ready position aimed at the subject when Tygard knocked him aside to raise his AR-15 to an angulated position and fire off several rounds into Lehman's chest.

Two Washoe Sheriff's rigs were on the western shoulder of U.S. 395 in the path of travel of the "escape route" Tygard came to "fear". When the vehicle went into reverse, an officer commanded the civilians to back away from their position to the north and they complied.

Robinson knew all Lehman had was a knife. Lehman's weapon was not Robinson's cause for shooting. Robinson knew Stahl and Giurlani were trying to negotiate. He knew the trained negotiator was en route. He knew the tires were flat. Robinson cannot identify anyone behind the truck when he shot. Robinson saw an officer jump out of the way before the backing of the vehicle. Robinson speculated decedent was going to kill someone, but could not describe anyone specifically at risk.

Scichilone positioned his vehicle north of the subject vehicle and took a position with a long gun where he had direct visibility through the passenger window as well as the cab window. He did not think it necessary to shoot. Reinaldo and he agreed Reinaldo would try to break the passenger's side window and Scichilone would then deploy the taser through the passenger side window.

Lehman could not flee anywhere except backwards, according to Slobe. Slobe was going to block Lehman's truck, as his vehicle's engine was still running and his vehicle was positioned to the north rear of Lehman's truck. Upon arrival, Slobe took a position of cover at the right rear tire of Lehman's vehicle with weapon aimed. He had a position of advantage and cover while Giurlani and Stahl negotiated. He observed negotiations

to be successful and working based upon what he saw and his training in negotiations.

A Reno police officer called out to Slobe. He turned around and saw a Reno police officer with a long gun directing him to move back. Because he was in the line of fire, he complied; he would not have otherwise moved back from his position of advantage, which was a superior position of advantage to that of the RPD officer. From his new position, 30 feet away, he saw no one was behind Lehman's truck.

Giurlani and Stahl were officially in control. Slobe adds that as long as negotiations were proceeding, standard tactical training tells the officer to let that continue indefinitely with those two officers in charge, until command takes over. No one relieved the negotiators. The two in charge did not call for action by others. No one ordered the shooting. Slobe, a trained negotiator, respects the fact there is no "deadline" for negotiations — you let them continue as long as feasible. He saw no need for the escalation of force.

Slobe testified that tasers were applied and Lehman tensed up. Lehman looked at Reinaldo trying to break the passenger window and reversed the truck. Shots were fired just as Lehman's truck had collided with the NHP vehicle.

Stahl joined the earlier pursuit on his motorcycle and parked behind Klier's vehicle. Stahl was at the front of Klier's vehicle, using it as cover, with his weapon directed at the subject. When he and Klier approached the front of Klier's vehicle, the subject had exited the

truck and was moving towards the front corner of Klier's vehicle with knife raised as if he was coming at them, paused, appeared to do it again, and paused. They commanded him to drop the knife or they would shoot. He did not drop the knife, but he retreated to his vehicle and got back inside. From that point forward, Stahl attempted to negotiate, getting Lehman's mind off of the bad things, by asking his name, personal information and giving encouraging words about the future. At one point it looked like he was going to put the knife on the dash.

Stahl took control, had dialogue, was calming Lehman down and would call himself the primary officer on scene. No one asked his permission to enter the scene and he gave no order for anyone to intervene. He never had an intent to shoot. He never saw the need to shoot. If he had, he would have shot. There was never any order that Lehman stop revving the car or he would be shot. Stahl at the time of the shooting was moving forward to assess the situation and attempt to diffuse it, not shoot. He had his weapon in ready position as he walked toward the driver's side, when suddenly another officer stepped in front of him with a long gun and shot Lehman.

The knife had nothing to do with Tygard's decision to shoot. Tygard took out his AR15 and took a position at Slobe's car on the driver's side over the roof. He had a 10-15 yard clear shot to Lehman's head through the back windshield of the truck. He learned Lehman did not have a gun. At some point he moved around the back of the NHP rig to a position at the driver's door, standing, in ready position, aiming at the back of

Lehman's head through the back windshield. Tygard could not recall why he moved from one position to the other. He was comfortable with his new position, with a bead on Lehman's head through the rear window. He knew that efforts were being made to get Lehman to put down the knife and come out. He knew that tasers were being deployed and he saw Lehman appear to have been reacting to a successful deployment of a taser. Lehman's truck collided with the vehicle next to which Tygard was standing. Tygard was next to the NHP rig, but not in the path of the truck. Tygard moved out of the way, then decided to shoot, ran forward to the driver's door, lowered his weapon so the trajectory would be through the victim and to the ground, and shot multiple times. He saw the bullets enter the left side chest area at the nipple level and believes that the third shot ripped off Lehman's bicep. His fear was for the 15 or so citizens 15-20 yards northwest of Lehman's vehicle on the shoulder and in the path of travel should Lehman's truck have been able to maneuver a right turn from its position against Giurlani's vehicle. He saw this path of travel as a possibility from his first position on scene. Tygard knew that three officers were positioned in that northern direction, providing the northern perimeter of fire, with vehicles.

To summarize, Lehman was in his vehicle with a pocket knife. That vehicle had been disabled by the flattening of all four tires. Rearward mobility was blocked by an NHP vehicle. He just received high-voltage discharges of electricity into his body from at least two tasers that had deployed. His vehicle traveled backward into the NHP vehicle, where it stopped. The videotape shows the vehicle had come to a stop, with no

further movement, for two seconds, before eight rounds were fired into Lehman's head and torso from close range causing his death.

Robinson saw an officer jump out of the way. His statement made after the incident shows he saw this *before* he shot and before the vehicle backed up. He thought Lehman was going to kill "somebody", but cannot describe anyone in imminent and actual danger, at any specific location. His litigation belief of people present immediately behind Lehman's truck is inconsistent with his post-incident statement. This litigation belief is also belied by all other eyewitness accounts and by the videotape. Tygard established no one was behind the vehicle, and he should know, as he was right there, at the NHP driver's door. He did not feel he was in harm's way in that position, even that close. Giurlani, McGee, Slobe, Wright, Daniel, Klier and Stahl testified no one was at risk behind the vehicle. Next to Tygard, Slobe had the best view.

Tygard shot because he thought of escape, but his "fear" about citizens and officers to the north is checked by other facts. The citizens were ordered to move and they did. There is no evidence Tygard could not see the citizens from his vantage, and thus he could see them move. Officers explained Lehman was ill-equipped to escape. He was blocked to the rear. Forward was a dirt embarkment and a cyclone fence. His tires were flattened. Slobe's vehicle was running, driver's door opened, ready to head him off. A big motorcycle was in the way, and two Sheriff's rigs were on the shoulder should he be able to access that route north.

The defense depiction of the videotape can only be given in the hope the Court does not have the stomach to watch the killing and efforts to resuscitate. For instance, the defense asserts the NHP video shows Lehman's "non-compliance" and the "presence of numerous officers in harm's way." It does nothing of the sort. One cannot make out for sure what Lehman is doing or why he is doing it. One cannot hear the dialogue to which participants have testified. One cannot see the knife in the videotape. For all the viewer knows, he could have dropped it. As for "numerous officers in harm's way," the video is focused on the cab — we have no view of the officers supposedly in harm's way. We only have a view of one person in harm's way, and that is Lehman getting shot.

Klaumans' videotape is useless as to the shooting, and the Petitioners speculate this is because the camera operator "ducked" to avoid gunfire. The defense depicts this video as showing that Lehman could have gotten past the NHP vehicle. A good look shows Lehman's left bumper is enmeshed in the NHP rig's radiator, rendering further movement unlikely. This is especially true when one sees the NHP wheels turned to the right. The NHP wheels were angulated north. The truck was enmeshed in its grill, tires turned south — meaning backward movement of the truck would be southerly. It is thus unlikely Lehman could have made any farther progress backward. If he had, Klier's vehicle, seen in Klaumans' video, was there to stop the progress. The Klaumans' videotape moves around to show Tygard's vantage point next to the NHP rig.

Citizen Preiss stated it did not look like Lehman was trying to back into the officers. Preiss could clearly see no officers were behind his truck. Preiss had a "bird's eye view" from atop a building.

Citizen Matassa stated Lehman was very calm through the scenario. He states Lehman was boxed in — "There was no way that the guy was going to get out of there."

REASONS FOR DENYING THE PETITION

The Fourth Amendment issue in this case was canvassed in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769 (2007) and *Brosseau v. Haugen*, 543 U.S. 194 (2004). This case does not present any serious basis for clarification of those holdings. Qualified immunity turns on the specific facts of each case, but this does not render the law unclear for qualified immunity purposes. *Saucier v. Katz*, 533 U.S. 194 (2001); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Novel circumstances do not render the law unclear as long as the reasoning of prior caselaw puts the officer on notice. *Hope v. Pelzer*, 536 U.S. 730, 743 (2002).

Petitioners contend the courts below misapplied *Haugen*. Distinguishing *Haugen*, even incorrectly, is a "misapplication of a properly stated rule of law", an error expressly excluded from the ambit of Supreme Court Rule 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." *Id.*

The argument that the court below misapplied the law as to the videotape or otherwise does not rise to an important federal question worthy of a writ of certiorari to the Ninth Circuit. This too is but a "misapplication of a properly stated rule of law", generally disqualified from certiorari by Rule 10. The courts below reviewed the videotape. Four jurists have reached the same conclusion about it, actually following *Harris*.

Nor does this case present a lower court decision that has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rule 10(a).

In short, none of the considerations under Rule 10 are present. The present petition does not present the rare case for certiorari described in Rule 10. Therefore, the petition should be denied.

Seizure by deadly force is a Fourth Amendment seizure. *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 (1985). The significance of the threat is not dependent upon what the officer says it is, but upon an objective analysis of the available facts which could constitute probable cause to hold such a belief. *Garner*, 471 U.S. at 3; *Graham v. O'Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). Lehman was no immediate threat to anyone. The vehicle was a concern. But it was not an immediate threat. Once Lehman backed up, the drama escalated, but not the danger. Construing the evidence in Respondent's favor, Lehman was stopped in his rearward movement; he had not threatened to shift or move forward; no one was endangered in any immediate

way; two seconds elapsed with Lehman just sitting there — and he was shot. Lehman was killed for damaging an NHP rig and sitting still after that.

Nothing Lehman did put Robinson in harm's way. Robinson's litigation belief of phantoms behind the vehicle is at odds with his statement contemporaneous to the incident that the only man he saw had *already* jumped out of harm's way.

Tygard did not fear for his own safety. He looked for people to the north. But any such threat was not imminent. Two Sheriff's vehicles and a motorcycle partially blocked that route. Citizens to the north had complied with commands to move out of that area. The officers in that direction were armed and barricaded behind vehicles, with vehicles behind them, behind which they could flee further, achieving even more protection. On the NHP videotape, we can hear discussion of aim, should Lehman move their way. Tygard saw all of this.

The shooters' Departmental Order tells them not to shoot based on "flight alone." So does *Garner*, *supra*. But flight would have been ineffective. He was contained, as correctly found by the learned district court once and twice by the Circuit panel. Even after the backing, negotiator Stahl did not believe there was reason to shoot. Others, including Slobe, agreed.

Lehman was doing nothing to justify the use of deadly force by any constitutional measure. No shooter waited for his next move. His vehicle was still. He was sitting there. Two seconds elapse on the tape. He was not escaping, let alone of any immediate threat to

anyone. This was not a "split-second" judgment scenario. It was killing based upon a "maybe". *Garner* teaches officers that they do not get to shoot their guns at citizens based on "maybe". Lehman's flight had ended in the NHP rig's bumper. Vehicular movement had stopped. Forward shifting and forward movement had not happened. There is a question about the escape routes. But the existence of an escape route does not alone justify deadly force. *Garner*, *supra*. There must be probable cause to believe a significant and immediate threat of substantial physical harm exists. *Id*. Citizens had been moved. Nothing blocked Petitioners from seeing this. Officers toward the north were barricaded as we see on the video. They had guns ready to protect themselves if needed. Petitioners saw this. They knew Lehman's tires were flattened; that Slobe's car was running, driver's door open, ready to cut Lehman off; that two Sheriff's rigs were parked on the shoulder and a large motorcycle, all seen on the videotapes, were unmanned blockades; the forward path to a residence was blocked by a cyclone fence and a berm; and his rearward movement had stopped. Accepting the facts posited by Respondent as true, as confirmed by the videotape, decedent was contained in his truck, not going anywhere. Deadly force could not be used under these circumstances.

Garner suggests commission of a violent crime by the suspect may weigh in the analysis. Here, all Petitioners knew about the events leading to the PIT maneuver and prior to the shooting was an ambiguous "shots fired" radio transmission, but they had then learned that all Lehman had was a knife. This, with visualization of flat tires and the obvious bullet markings

on the truck (Klaumans' videotape), would tell a reasonable officer Lehman received, not gave, the shots fired.

CONCLUSION

Petitioners are not entitled to qualified immunity as a matter of law because the facts display a violation under clearly established law. The courts below properly denied qualified immunity, and held that the Fourth Amendment claim should go to a jury. For these reasons, the Petition should be denied.

Resectfully submitted,

JEFFREY A. DICKERSON
9655 Gateway Drive, Suite B
Reno, NV 89521
(775) 786-6664
jeff@gbis.com

Attorney for Respondent